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386-564—70

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1584

INTRA BANK, S.A., PETITIONER

v.

WILLIAM T. DENTZER, JR., SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AND UNITED STATES OF AMERICA

No. 1595

AMERICAN INTERNATIONAL UNDERWRITERS CORPORATION, ET AL., PETITIONERS

v.

WILLIAM T. DENTZER, JR., SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK, AND UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT UNITED STATES OF AMERICA IN OPPOSITION

OPINIONS BELOW

The opinions of the Supreme Court of the State of New York, New York County, of June 12, 1968 (App. 26a–54a)[1] and of September 16, 1968 (App. 15a–25a)

[1] The reference "App." is to the appendix to Intra Bank's petition for a writ of certiorari, No. 1584.

are unofficially reported in 308 N.Y.S. 2d 520. The Appellate Division, First Department, affirmed without opinion (App. 15a), 31 App. Div. 2d 721, as did the Court of Appeals of the State of New York (App. 6a), 25 N.Y. 2d 619. The Court of Appeals' order granting an amendment of the remittitur (App. 1a-2a) is reported in 26 N.Y. 2d 831.

JURISDICTION

The New York Court of Appeals entered its order of affirmance on October 30, 1969 (App. 6a), and a timely motion for reargument was denied on February 19, 1970 (App. 1a). The petitions for writs of certiorari were filed on May 18 and on May 20, 1970, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether approval by the courts of the State of New York, under § 618(1) of the New York Banking Law, of a compromise of a claim by the United States, against assets being held by the Superintendent of Banks in the liquidation of a New York branch of a foreign bank, was rendered on the basis of an informed and independent judgment by the State courts as to whether the compromise was fair and equitable.

STATUTES INVOLVED

Section 5 of the Act of March 3, 1797, c. 20, 1 Stat. 515, as amended (31 U.S.C. 191), provides:

> Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the exe-

> cutors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

Section 4(e) of the Commodity Credit Corporation Charter Act of June 29, 1948, c. 704, 62 Stat. 1070, as amended (15 U.S.C. 714b(e)), provides:

> The Corporation—
>
> Shall have all the rights, privileges, and immunities of the United States with respect to the right to priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors. The Corporation may assert such rights, privileges, and immunities in any suit, action, or proceeding.

Sections 606 and 618 of the New York Banking Law are reproduced in the appendix to petition No. 1584, pp. 83a–88a.

STATEMENT

Petitioner in No. 1584 is a Lebanese banking corporation ("Intra Bank") which, until October 14, 1966, was licensed by the New York Superintendent of Banks ("Superintendent") to operate a branch bank in New York City. Petitioners in No. 1595 are five American and foreign insurance companies ("Insurers") which

are creditors of Intra Bank (R. 248),[2] and whose claims are not based on separate transactions with the New York branch of Intra Bank, but, rather, stem primarily from deposits made in various Intra Bank branches throughout the world as conditions precedent to doing insurance business in different countries. (R. 248).

On October 15, 1966, as a result of Intra Bank's suspension of its business in Lebanon and elsewhere, the Superintendent took possession of the business and property of the New York branch of Intra Bank ("IBNY"), and thereafter determined to liquidate the branch.[3] This determination was not challenged by Intra Bank, even though it had a right to do so under the Banking Law of New York, § 607.

Subsequent to this action by the Superintendent, the Insurers instituted in the New York State courts actions against Intra Bank by serving orders of attachment against assets of IBNY then held by the Superintendent (R. 248). Upon the Superintendent's

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[2] The reference "R." is to the record on appeal in the Court of Appeals of New York, copies of which have been filed with the Clerk of this Court.

[3] The liquidation scheme as set out in the Banking Law of New York imposes upon the Superintendent the duty to marshal all of IBNY's assets (§ 618(1)); provides for the filing and proving of preferred claims (§ 620), defined as those claims of depositors and creditors which would constitute an enforceable legal obligation against the local branch of the foreign bank if it were a separate and independent legal entity (§ 606(4)(a)); calls for the payment out of the assets collected of preferred claims (§ 606(4)(a)); and requires remittance of any remaining assets, after payment of costs of administration and liquidation, to the principal office of the foreign banking corporation or to its domiciliary liquidator or receiver (§ 606(4)(b)).

motion, the Supreme Court of New York stayed further proceedings under the attachment orders (R. 255), and directed (R. 255),

> that in the event of liquidation or other reorganization proceedings by the Superintendent the attachment shall stand only as to any excess funds as defined in Banking Law, section 606(4)(b), returned by the Superintendent to * * * [Intra Bank in Beirut].

On July 18, 1967, in response to the Superintendent's Notice under § 620 of the N.Y. Banking Law (R. 49), the United States filed on behalf of the Commodity Credit Corporation ("CCC") a claim in the amount of $21,010,766, plus interest, based on 53 irrevocable letters of credit issued by IBNY for the account of various American exporters in favor of CCC. These letters of credit related to commodities sold by CCC under its Export Credit Sales Program (R. 50). Simultaneous with this filing, the United States asserted a federal priority based on 31 U.S.C. 191 and 15 U.S.C. 714b(e) with respect to its claim. No timely objection was entered by any interested party under § 623 of the N.Y. Banking Law (R. 51); however, on August 9, 1967, the Superintendent rejected the claim (R. 51). The United States formally challenged this rejection in the courts of the State of New York,[4] and in federal court by instituting an independent action.[5] These actions were suspended, pending the outcome of the instant proceedings.

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[4] *United States* v. *Wille, et al.*, Sup. Ct. N.Y., N.Y. Co., Index No. 40361-68.

[5] *United States* v. *Wille, et al.*, S.D.N.Y., 68 Civ. 1434.

On February 1, 1968, the Superintendent and the United States entered into a compromise agreement (R. 62–70), by the terms of which the Superintendent was to accept the previously rejected claim of CCC against assets of IBNY in exchange for which CCC agreed to forego payment of its claim until payments had first been made to all other creditors in the liquidation proceeding whose claims had been accepted or determined to be valid; the Superintendent further agreed to assign to CCC all his right, title and interest in and to various actions seeking to reduce to possession certain assets of Intra Bank to which the Superintendent claimed statutory title.

The Superintendent petitioned the Supreme Court of the State of New York for an approval of the compromise on February 16, 1968 (R. 49–61). An order to show cause was entered the same day (R. 41–45), setting a hearing for March 27, 1968. The objections of Intra Bank and the Insurers were fully heard at this hearing (R. 20, 21–40), and on June 24, 1968, the court entered an order approving in all respects the compromise agreement between the Superintendent and CCC (R. 16–18). The affirmance of that order by the Court of Appeals of the State of New York gives rise to the instant petitions.

While this sequence of events was transpiring in the United States, similar steps were being undertaken against Intra Bank abroad. In Lebanon, following suspension of Intra Bank's operations in October 1966, involuntary bankruptcy proceedings were instituted before the Commercial Court of Beirut,

and on January 4, 1967, Intra Bank was declared a bankrupt as of October 14, 1966. These proceedings were subsequently suspended as a result of passage by the Lebanese Parliament of Law No. 2/67 on January 16, 1967. That Law divested the Commercial Court of jurisdiction over Intra Bank and empowered it to appoint a special "Management Committee" to manage temporarily the affairs of Intra Bank and, absent immediate recovery, to liquidate Intra Bank in an orderly fashion.

On October 11, 1967, the four major creditors of Intra Bank (the Governments of Lebanon, Qatar and Kuwait, and CCC) entered into an agreement with the Management Committee (the "Beirut Agreement"; R. 217–223), providing for Intra Bank's reorganization (R. 219–220). Contemporaneously with the Agreement, these four major creditors and the New York investment banking firm of Kidder Peabody & Co., Inc.—which had proposed the reorganization plan—agreed upon a Protocol to the Agreement (the "Beirut Protocol"; R. 224–230). The essential features of the Protocol were an agreement of principles regarding the formation of a new company (Art. 2, R. 224); agreement of assumption of liabilities through stock ownership (Art. 3(a) and (b), R. 225–226); a reservation of rights by CCC to proceed against Intra Bank's assets in the United States; and a provision that CCC would surrender its shares of stock in the new company to the extent its claim was satisfied out of United States assets (Art. 3(e), R. 226).

As required by Lebanese legislation, the Beirut Agreement, together with the Protocol, was subsequently submitted to the local courts for approval. The Court of First Instance of Beirut, by its judgment of November 4, 1967, unanimously ratified the Beirut Agreement and Protocol (R. 457–461) and, in so doing, expressly rejected the objection (R. 459) that such ratification would enable CCC to obtain "preferential treatment" (R. 460).

ARGUMENT

Under the guise of a Due Process issue, Intra Bank and the Insurers ask this Court to review for a third time whether the New York trial court, in approving the compromise between the Superintendent and CCC, rendered an "informed and independent judgment as to whether [the] proposed compromise is fair and equitable," and "apprised [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." *Protective Committee* v. *Anderson,* 390 U.S. 414, 424. Assuming *arguendo* that this standard, first enunciated in a case involving "a corporate reorganization under Chapter X of the Bankruptcy Act * * *, 11 U.S.C. §§ 501–676" (*id.* at 418), is applicable in the context of a state liquidation proceeding under the New York Banking Law, the test has been fully satisfied.

Petitioner Intra Bank reasserts here *first,* that CCC's claim against IBNY's assets and its reliance on the federal priority statute presented questions not fully litigated on the merits in the state courts (Pet.

I, 3, 14–18)[6]; *second,* that the record does not conclusively establish Intra Bank's insolvency (Pet. I, 3, 18–19); and *third,* that the compromise agreement violates the Beirut Protocol (Pet. I, 3, 20–21) and disregards a prior Lebanese judgment which is entitled to "faith and credit" (Pet. I, 11). Similarly, the Insurers challenge (Pet. II, 16–25) the trial court's findings that CCC's claim does arise out of New York transactions (App. 38a), and that, for purposes of the proposed compromise agreement with the Superintendent, the record sufficiently establishes the "probability of ultimate success" if CCC's assertion of federal priority under 31 U.S.C. 191 were to go to trial (App. 45a).

Each of these arguments received painstaking attention by the trial court and was found to be without merit; they were briefed extensively and argued in two appellate courts of the State of New York, and again they were rejected. Nothing is said in the petitions to warrant further review.

1. That the New York State courts did not fully litigate the merits of CCC's claim is readily conceded. To have done so would have been both improper and inappropriate. For, as this Court expressly recognized in *Protective Committee* v. *Anderson, supra,* 390 U.S. at 424–425, the very purpose of a compromise agreement is to achieve "the likely rewards of litigation" without subjecting contracting parties to the "complexity, ex-

[6] The reference "Pet. I" is to petition No. 1584, filed in this Court by Intra Bank; the reference "Pet. II" is to petition No. 1595, filed in this Court by the Insurers.

pense, and likely duration of such litigation." It is not the function of the reviewing court to determine conclusively the merits of a compromise,[7] but rather to ascertain "the probability of ultimate success" if the claim were to be fully tried. In essence, the aim is to avoid protracted litigation, not to encourage it.

As pointed out repeatedly by the New York State courts in these proceedings, the compromise agreement here fully meets the "fair and equitable" standard enunciated in *Anderson, supra,* at 424–425. This conclusion is amply supported by the voluminous record in this case. The contention that CCC's claim was "contingent" and thus not provable in New York liquidation proceedings was rejected only after the most extensive review of legal authorities (App. 37a–45a). Similarly, the question of CCC's federal priority under 31 U.S.C. 191 underwent careful scrutiny (App. 45a–52a) before the court concluded that the "probability of ultimate success" on trial (App. 45a) had been satisfactorily demonstrated. And full consideration was given to the equities of the situation presented, as evidenced by the following statement of the trial court (App. 38a):

> The claim of CCC does not depend solely on its rights as holder of the letters of credit. It has a claim for restitution, based on the fact that Intra NY has procured money "under such circumstances that in equity and good conscience [it] ought not to retain it" [citing *Pink* v. *Title Guarantee & Trust Co.* 274 N.Y.

[7] Clearly, if a court were required to decide the "fairness" of a compromise on the basis of a full trial on the merits, all impetus to compromise would disappear.

> 167], and which Intra NY "is obliged by natural justice and equity to refund" [citing *Bayne* v. *United States*, 93 U.S. 642]. That debt becomes subject to CCC's statutory priority (see *Bayne*). CCC may sue directly on the debt, without recourse to the letters of credit. * * *

In these circumstances, it is difficult to imagine what more the court below could have done, short of a full trial on the merits, to determine the fairness and reasonableness of the proposed compromise. Indeed, the petitions here, directed almost exclusively to extensive reargument of the merits, appear to concede as much.

2. The claim by Intra Bank that there is no support below for a finding that it was insolvent (Pet. I, 19) is equally without merit. The record contains a square admission by the court-appointed Management Committee that as of October 1966 the capital of Intra Bank was "totally lost as proved by the report of the experts in general and by the report of Cooper Bros. in particular" (R. 219). That admission was expressly ratified by the Court of First Instance of Beirut (R. 461). Moreover, the Beirut Agreement and Protocol (R. 217–230)—designed to save Intra Bank from immediate bankruptcy liquidation—were entered into one-half year before the Superintendent sought court approval of the compromise agreement.

By any reasonable standard, the proof in the record is more than ample to demonstrate insolvency. Suspension of Intra Bank's operations in October 1966, cessation of its payments, and the Superintendent's unchallenged takeover and liquidation of IBNY's assets in New York are all clear indicators of Intra

Bank's inability to pay existing debts. See *Cunningham* v. *Norton*, 125 U.S. 77, 90.

3. Equally devoid of substance is the claim that CCC's compromise with the Superintendent violates the Beirut Protocol (Pet. I, 20–21). Article 3(e) of that document states expressly that, "This Protocol *does not prevent CCC from pursuing its claims under United States laws against Intra Bank assets * * * in the United States*" (emphasis added), and provides for the surrender by CCC of shares in the new company "to adjust for proceeds that it may receive in implementation of a Court decision in the United States" (R. 226). Accordingly, this belated argument[8] finds no support in the express language of the Beirut Protocol. Similarly, there is no merit to the further contention that approval of the compromise below somehow failed to respect the judgment of the Court of First Instance of Beirut (Pet. I, II). The Lebanese tribunal expressly held, in response to a challenge to the italicized language quoted above, that (R. 460):

> The privileged treatment enjoyed by Creditors abroad in collecting their debts has not been granted to them by the agreement. They enjoyed this privilege by the laws of their country

[8] None of the opposing papers filed by Intra Bank at the hearing on March 27, 1968, made any mention of CCC's alleged agreement not to compromise any litigation in the United States. Petitioner's answer to the Superintendent's moving papers raised four defenses, one alleging that the petition fails to state a cause of action, and the others attacking on various theories the validity of CCC's claim (R. 95–98). One would expect that if an express agreement against compromise now claimed by the petitioner did in fact exist, petitioner would have immediately challenged the proposed agreement of compromise on that basis.

and the agreement did not, therefore, deprive them (the other Creditors) of any of their rights.

On the basis of the entire record, it is clear the New York courts rendered an informed and independent judgment as to whether the agreement of compromise fairly and equitably resolves CCC's claim under the New York Banking Law against assets of Intra Bank's branch bank in New York. The areas of disagreement with the conclusions drawn by the courts below, as reflected in petitions Nos. 1584 and 1595, raise no constitutional issues and present no occasion for this Court to review the voluminous record for a third time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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